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IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No 310 of 1984

For Approval and Signature:

Hon'ble MR.JUSTICE B.C.PATEL and

MR.JUSTICE K.M.MEHTA

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1. Whether Reporters of Local Papers may be allowed : YES
to see the judgements?
2. To be referred to the Reporter or not? : NO
3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?
4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge? : NO

COMMISSIONER OF INCOME TAX

Versus

H LINK,M/S A F FERGUSON AND CO

Appearance:

MR MANISH R BHATT for Petitioner
MR JP SHAH for Respondent No. 1

CORAM : MR.JUSTICE B.C.PATEL and

MR.JUSTICE K.M.MEHTA

Date of decision: 20/12/1999

ORAL JUDGEMENT

(PER PATEL, J.):

1. The CIT, Baroda moved the Income Tax Appellate Tribunal (hereinafter referred to as "the Tribunal") for making reference under the provisions contained under the Income Tax Act, 1961 (hereinafter referred to as "the Act"). The questions of law referred are as under:

1. "Whether, on the facts and in the circumstances of the case, the Tribunal was right in holding that the income computable under the head "salaries" had not been earned in India as contemplated under section 9(1)(ii) of the Income Tax Act?".

2. "Whether, on the facts and in the circumstances of the case, the Tribunal was right in law in coming to the conclusion that the living allowance did not form part of the salary under section 17 of the Income Tax Act, and therefore, exempt from Tax?"

3. "Whether, on the facts and in the circumstances of the case, the Tribunal was right in law in coming to the conclusion that the value of rent free accommodation would not constitute a perquisite within the meaning of section 17(2) of the I.T. Act, 1961?"

2. The assessee, a foreign technician was serving at the relevant time with Gujarat Narmada Valley Fertilisers Ltd, Broach. He was paid salary in foreign currency abroad and was allowed daily allowance, rent free accommodation during his stay in India. The assessee claimed that his entire income was exempt from tax. The ITO assessed the total income as Rs.92,660/-. The appellate Assistant Commissioner allowed the appeal partly following the decision of the Gujarat High Court in the case of CIT Gujarat vs S.G.Pgnatale reported in 124 ITR 391. The Income Tax Officer preferred an appeal before the Tribunal. The Tribunal by its order, dated 17.2.1984 confirmed the order passed by the AAC and rejected the appeal. It is against this order, the CIT has filed the application before the Tribunal and the Tribunal has referred the above referred three questions.

3. The Division Bench of this Court in the case of CIT, Gujarat vs S.G.Pgnatale reported in 124 ITR 391 had

consider identical situation. In that case the assessee was an employee of a French Company which had entered into an agreement with an Indian Company for rendering certain services in Europe and providing back-up service and other assistance in installing a plant in India. The Indian Company agreed to pay a lump sum for all these services. The Indian Company agreed to pay living allowance to foreign specialists. The allowance was likely to be reduced or increased depending upon various factors like the place where the services were to be rendered, whether free accommodation or free road transport was allowed etc. The court held that the living allowance was given to the assessee as a reimbursement rather than as personal advantage and hence was not a "perquisite". So far as the assessee is concerned the Division Bench of this Court in the case of CIT, Baroda vs Shri H.Fink (ITR No.294/82 decided on 11.7.85) considered the question, i.e. of retention remuneration, living allowances and rent-free accommodation as salary or perquisite. Considering the provisions of the Act and on the facts of the case the court held that retention remuneration was not salary earned in India within the meaning of Section 9(1)(ii) and similarly living allowance can not be said to be personal advantage and therefore would not constitute perquisite which can be subjected to tax. The court further held that the perquisite which can be taxed under section 17(2) of the Act which may be in the nature of rent free accommodation can be only those perquisites which are provided by the employer to his employee and inasmuch as the assessee was found to be an employee of Linde, A.G, West Germany, and the employee was deputed to India with Gujarat Narmada Valley Fertilizer Co Ltd, Broach which provided the rent free accommodation to him. It can not be said that it would constitute perquisite within the meaning of section 17(2) of the Act. Thus, the court answered the question in favour of the assessee and against the revenue. Accordingly, in this case also answer must be in favour of assessee and against the revenue and answered accordingly, i.e. in favour of assessee and against the revenue. No order as to costs.